C # 17080

NATIONAL ARBITRATION PANEL

In the Matter of Arbitration between NATIONAL ASSOCIATION OF LETTER CARRIERS and UNITED STATES POSTAL SERVICE	Case No.: Q90N-4Q-C 94029376

BEFORE: Carlton J. Snow, Professor of Law

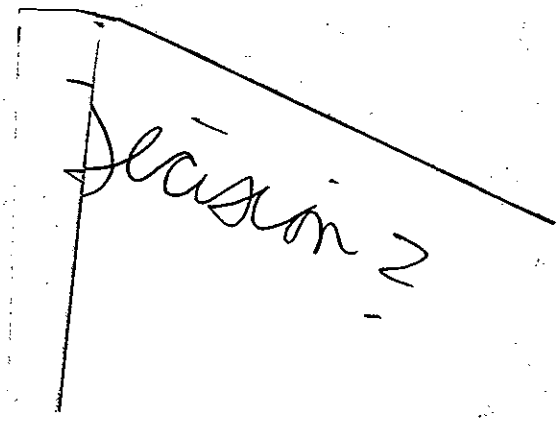
APPEARANCES: For the Employer: Mr. Howard J. Kaufmann
Ms. Larissa O. Taran

For the Union: Mr. Keith E. Secular

PLACE OF HEARINGS: Washington, D.C.

DATES OF HEARINGS: June 24, 1996
January 13, 1997
February 25, 1997

POST-HEARING BRIEFS: May 28, 1997



AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer's unilateral change to the methodology for determining when the target percentage is reached violated the parties' commitment to joint administration of the DPS process. The dispute is remanded to the parties for further negotiation and joint resolution in light of this opinion. Until such a resolution is achieved, the Employer may continue using the "weekly average" method. In the event that negotiations are unsuccessful, the arbitrator shall retain jurisdiction until December 1, 1997; and either party may cause the matter to be scheduled for remedial hearings in arbitration by giving notice to the arbitrator no later than December 1, 1997. It is so ordered and awarded.

Date: August 4, 1997

Carlton J. Snow
Professor of Law

IN THE MATTER OF ARBITRATION BETWEEN NATIONAL ASSOCIATION OF LETTER CARRIERS AND UNITED STATES POSTAL SERVICE (Case No. Q90N-4Q-C 94029376)	ANALYSIS AND AWARD Carlton J. Snow Arbitrator

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from June 12, 1991 through November 20, 1994. Hearings were held on June 24, 1996, January 13, 1997, and February 25, 1997 in a conference room of Postal Service headquarters located in Washington, D.C. Mr. Keith E. Secular, with the law firm of Cohen, Weiss, and Simon in New York City, represented the National Association of Letter Carriers. Mr. Howard J. Kaufmann, Senior Counsel, and Ms. Larissa O. Taran, attorney, represented the United States Postal Service.

The hearings proceeded in an orderly manner. The parties had a full opportunity to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. Ms. Jan del Monte of Diversified Reporting Services, Inc. reported the proceedings for the parties and submitted a transcript of 455 pages. The advocates fully and fairly

represented their respective parties.

The parties stipulated that the matter properly had been submitted to arbitration and that there were no issues of substantive or procedural arbitrability to be resolved. They elected to submit the matter on the basis of evidence presented at the hearings as well as post-hearing briefs, and the arbitrator officially closed the hearing on May 28, 1997 after receipt of the final brief in the matter.

II. STATEMENT OF THE ISSUE

The issue before the arbitrator is as follows:

> Did the Employer violate the parties' agreement by changing the methodology for determining when the target percentage is reached in a DPS work environment? If so, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 3 MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

C. To maintain the efficiency of the operations entrusted to it;

D. To determine the methods, means, and personnel by which such operations are to be conducted.

ARTICLE 19 HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable.

. . . .

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least sixty (60) days prior to issuance. At the request of the Unions, the parties shall meet concerning such changes. If the Unions, after the meeting, believe the proposed changes violate the National Agreement (including this Article), they may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change. . . .

ARTICLE 41 LETTER CARRIER CRAFT

Section 3. Miscellaneous Provisions

S. City letter carrier mail counts and route inspections and adjustments shall be conducted in accordance with Methods Handbook M-39, Management of Delivery Services, as modified by the parties' Memorandum of Understanding dated July 21, 1981 and October 22, 1984 (incorporated into December 24, 1984 Award).

IV. STATEMENT OF FACTS

This is a dispute about which is the correct operational formula in a work setting that uses a process known as delivery point sequencing. In this case, the Union challenges the right of the Employer to make changes that allegedly violate the parties' commitment to a joint administration of a delivery program that emerged from the Employer's strong commitment to use automated equipment for sorting mail. The dispute has deep roots that reach back over a number of years and involves numerous grievances, arbitration awards, and negotiations between the parties. The dispute before the arbitrator represents but one thread of a much richer, more complex tapestry, and clarity comes only after viewing the broader design.

While focusing on the narrow issue presented for resolution, it will be useful to place it within its wider context. Without an understanding of this backdrop, the dispute might well be incomprehensible. Because facts and analysis cannot be efficiently separated in this case, the larger context of the dispute will be explored later in the report and reviewed in conjunction with the meaning of the facts.

V. POSITION OF THE PARTIES

A. The Union

It is the position of the Union that using 12-day numbers as opposed to a weekly average is required and constitutes a term of the parties' joint agreement. Accordingly, the Union argues that the use of 12-day numbers may not be revised without negotiation and agreement with the Union. Because negotiations in the latter part of 1993 allegedly did not resolve the issue, the Union argues that management has no authority unilaterally to revise its methodology by using weekly averages of DPS mail. The Union maintains that management is bound by the M-39 Handbook pursuant to Article 19 of the parties' collective bargaining agreement. A memorandum in September of 1992 dealing with unilateral adjustments and another dealing with X-route adjustments allegedly constitute nothing more than narrow exceptions to the M-39 Handbook. It is the belief of the Union that the goals and purpose of the M-39 Handbook must be followed. As the Union sees it, that purpose is to provide formal procedures for route adjustments with no room for unilateral action by management. It, accordingly, is the conclusion of the Union that any managerial rights which might exist in this case must derive only from the Memoranda of Understanding and not from the National Agreement.

According to the Union, these memoranda do not authorize unilateral adjustment of DPS methodologies because the 12-day method is binding on the parties, based on the contractual

nature of the Joint Training Guide and the intent of the parties. It was not the intent of the parties to authorize unilateral action, according to the Union.

The Union argues the Employer failed to prove that using the 12-day method frustrates the contractual intent of the parties. The Union contends that using the "two week average" methodology is not crucial to achieving the purpose of the parties because it affects cost only and not actual implementation of DPS procedures. Moreover, the Union believes that the averaging method is not the only alternative available for achieving efficiency.

B. The Employer

It is the position of the Employer that neither Memoranda of Understanding nor the Joint Training Guide specifies a particular method for determining when the targeted DPS percentage has been reached. Management contends that this aspect of the agreement was not negotiated but, in fact, was left open for managerial discretion. It is the position of management that no agreement mentions any particular standard for meeting the target percentage, but the explanation in the Joint Training Guide inserts a standard of a "minimum of two consecutive weeks." This is language that was negotiated in October of 1992 when the parties met to draft the Joint Training Guide. The Employer argues that the lack of a standard in

any memoranda and the imprecise two-week guideline in the Joint Training Guide support its conclusion that the parties left open the details for managerial discretion. The Employer allegedly exercised its discretion in January of 1993 when management drafted a "cookbook" with the daily formula. It allegedly exercised its legitimate discretion again on March 10, 1994 when the "Sam Green" memorandum authorized replacing the daily formula with a two-week average. Accordingly, the Employer contends that it was not in violation of the parties' agreement when management exercised its right to suggest a formula which better comports with the intent of the memoranda and the M-39 Handbook, namely, efficient implementation of DPS processes leading to eight-hour days.

The Employer also maintains that its "cookbook," in which the daily formula first appeared, is not a contractual document and was not negotiated. Nor did the fact that management sent drafts to the Union undermine this conclusion, according to the Employer. This allegedly was a mere courtesy and involves no commitment to the Union. Some, but not all, Union suggestions were incorporated into the "cookbook," and no further drafts ensued to achieve complete agreement. The Employer contends that it chose its formula in a belief that the formula would provide consistent quality and minimize subsequent adjustments. Moreover, management believed the formula could be adjusted if circumstances dictated a change.

The Employer contends that it has a right to manage its operation in an efficient manner, as made clear in Article 3

of the parties' agreement. According to management, contractual language in the memoranda and the Joint Training Guide does not limit managerial prerogatives with regard to methods of measuring the two-week standard. Rather, the Employer believes that the negotiated language is imprecise and leaves room for managerial discretion. It is the Employer's belief that using the daily formula is inefficient, for it ultimately results in routes of less than eight hours, requiring further adjustment and, thereby, defeating one purpose of the memoranda. Moreover, use of a weekly average allegedly does not contradict the memoranda or the Joint Training Guide.

It is the belief of the Employer that using a weekly average is consistent with traditional methods used to adjust carrier routes under the M-39 Handbook. Furthermore, available data from Count and Inspection Reports support use of a weekly average, and it is this information against which the target percentage is to be calculated, according to the Employer's view of the Memoranda of Understanding. The Employer offers as additional support for its position the fact that the Union provided no evidence of overburdened routes that resulted from using weekly average figures. Rather, the Employer contends that the weekly average adequately meets all goals of the parties' agreement.

It is also the contention of the Employer that the daily formula included in its "cookbooks" was mistaken and incorrect and does not reflect the consensus of the parties. Rather, it was written by a staff member who was not involved in

negotiations leading to any negotiated agreement between the parties. Hence, the Employer maintains that it should not be treated as dispositive.

VI. ANALYSIS

A. Contextual Expectations

The dispute in this case must be understood within the context of delivery point sequencing. DPS is another aspect of the Employer's commitment to automation using bar code readers to sort mail into delivery order. Such technology reduces the amount of time that letter carriers spend actually sorting mail and, accordingly, increases time "on the street" for making mail delivery. The strand of the tapestry to be reviewed in this case dates to 1992 and the Hempstead arbitration decision.

In the Hempstead case, the Union grieved action by management at the Hempstead installation. Management attempted to restructure delivery routes in anticipation of future benefits of automation. The Union contended that management's actions were premature, and Arbitrator Mittenthal agreed that route restructuring done solely in anticipation of future automation violated requirements of the M-39 Handbook and, hence, was impermissible under Article 19 of the parties' National Agreement. Arbitrator Mittenthal reasoned that Section 243.1 of the M-39 Handbook permits route adjustments only when routes are currently "overburdened" or "underutilized." Although Arbitrator Mittenthal decided that such prospective restructuring would constitute a contractual violation, he made no finding of fact that such a violation had occurred. He, rather, remanded the grievance to the parties for them to negotiate a methodology to implement route changes efficiently

where such changes were imminent or predictable due to such events as DPS automation.

In response to the Hemstead Award from Arbitrator Mittenthal, the parties negotiated a series of Memoranda of Understanding in September of 1992 and outlined their agreement regarding matters left unresolved in the arbitrator's decision. Two of the Memoranda of Understanding represented the parties' consensus with regard to two methods of implementing route adjustments in anticipation of using Delivery Point Sequencing. The parties described them as (1) the unilateral method and (2) the X-Route method. They incorporated and explained all six Memoranda of Understanding in a Joint Training Guide, published on November 19, 1992. In a spirit of cooperation, they entitled the document "Building Our Future by Working Together." (See Union's Exhibit No. 2.) The parties jointly drafted the Joint Training Guide during meetings held in October of 1992.

Pursuant to the unilateral method, management uses current route inspection information to estimate the effect of future DPS implementation and to plan route adjustments ahead of time. The Memorandum of Understanding specifies that "management may implement planned adjustments if the actual percentage of (DPS) mail received at the unit is within plus or minus five percentage points of the targeted . . . level." (See Union's Exhibit No. 2, p. 18.) In the parallel explanation set forth in the Joint Training Guide, the parties agreed that "management must show it has achieved the target percentage

for a minimum of two consecutive weeks." (See Union's Exhibit No. 2, p. 19.) Testimony at the arbitration hearing before this arbitrator from Messrs. Knoll and Vegliante suggested that the initial intent of the "two consecutive weeks" language was merely to avoid relying on the numbers from any particular, perhaps nonrepresentative, single day. Neither the Memorandum of Understanding nor the Joint Training Guide specified a particular formula for determining how to measure the "two consecutive weeks" standard.

Using the "X-route" method provided the second approach to implementing route adjustment in anticipation of DPS. As the parties agreed, "the X-Route process is an alternative approach to route adjustment in preparation for automation, particularly delivery point sequencing." (See Union's Exhibit No. 2, Appendix D, p. 65.) The parties further agreed that:

> If there is interest in attempting to use the X-Route alternatives, local management will meet with the local union to review the provisions of this agreement. This includes a review of the attached Memorandum of Understanding on case configuration, the Work Methods Memorandum, guidance on the Hempstead case resolution and current base count and inspection data. (Id.)

Interestingly, the Memorandum of Understanding concerning the X-Route process failed to include parallel language regarding the five percent leeway for implementation. Rather, "the decision as to when to realign the route should be based upon the current need for realignment in order to place the routes on as near an eight hour basis as possible based upon the

current evaluation from a recent inspection." (See Union's Exhibit No. 2, Appendix D, p. 67.) In other words, the process was left purposely flexible and responsive to joint local control, guided by principles in the National Agreement, Memoranda, and Handbooks. Yet, the explanation of the X-Route process in the Joint Training Guide repeated that "management must show it has achieved the target percentage for a minimum of two consecutive weeks." (See Union's Exhibit No. 2, p. 36.)

Joint training was the next phase of the process. On November 19-20, 1992, the parties met in Crystal City, Virginia for a joint training session. Representatives of the Union and the Employer jointly explained the process for implementing the Memorandum. In effect, these representatives trained the aspiring trainers.

Two witnesses called by the Union, Messrs. Young and Weiner, testified that, during the training session on the unilateral method of restructuring for future events, a member of the audience asked whether the "two week" standard must be met daily for two weeks or by a weekly average for two weeks. Both witnesses recalled Mr. Young said that the target must be met on each of the twelve days in the two weeks period. According to their testimony at the arbitration hearing, the representative of management present at the training session agreed with Mr. Young's answer by nodding his head. Neither witness was able to name the management representative. Yet, Mr. Jeff Lewis, who was also present for the "unilateral process" portion of the training, testified that, even though

he was present for the entire session, he recalled no such question or response. Two other witnesses, Messrs. Knoll and Peterson, testified that they also attended the sessions but never heard such a question or response. The point of the litany is that evidence regarding whether the parties reached agreement on a "12-day" formula is contradictory and inconclusive. Credibility factors from conflicting witnesses were in equipoise.

In January of 1993, the Employer drafted internal guidelines for implementing DPS. These became known as the "Cookbook." Mr. Jeff Lewis wrote the "delivery" section and participated in both the October, 1992 meetings and the training sessions in Crystal City during November of 1992. In mid-January of 1993, management distributed the draft of the "Cookbook" to personnel of both the Employer and the Union for comments. (See Union's Exhibit No. 4 and Employer's Exhibit No. 6.) Mr. Lewis testified that, when he began writing the "delivery" section of the "Cookbook," he received no instruction and had no knowledge regarding details for measuring whether the target percentages were met. To Mr. Lewis, it was "a management problem" to determine how to measure whether the target had been met. (See Tr., vol. 2, p. 62.)

The "delivery" section of the "Cookbook" includes a section entitled "Monitoring DPS Volume Versus the Established Target Percentage." (See Union's Exhibit No. 4.) An illustrative table in the draft document provides examples of DPS

percentages for two different hypothetical units. (See Union's Exhibit No. 4, p. 20.) In the first hypothetical example, Unit A, each of the twelve days in a two week period ranged between 60 and 68%. In the second hypothetical example, Unit B, the range was between 58 and 68%. An explanatory note states that:

> If both units had set their Target Percentage at 65%, only Unit A would qualify for implementation because Unit B's score was more than five percentage points below the target percentage on day 8. (See Union's Exhibit No. 4, p. 20.)

The Union proposed no revisions to this portion of the draft document, and the parties incorporated the unaltered language into the final version of the "Cookbook." Management distributed the "Cookbooks" in final form on March 22, 1993.

After the training sessions in Crystal City, trainers spread their knowledge across the country in local sessions that helped prepare the workforce for DPS implementation. Not surprisingly, these local sessions generated more questions. The parties responded by forming a joint committee to consider questions that had not already been answered jointly. They, then, distributed answers to trainers in an effort to insure uniformity of training. By March of 1993, joint answers to 80 questions had been published as a supplement to the Joint Training Guide. The last set was published on March 31, 1993, at which time the joint committee agreed to disband. As of that date, the joint committee had received no questions regarding the "daily" method versus the "two week average" method. In the meantime, implementation of DPS commenced on

March 21, 1993.

After the joint committee disbanded, personnel from the Western Area of the organization sent a written question on April 20, 1993 to Postal Service headquarters. The question asked whether managers should use the daily amount or the weekly average of DPS mail to measure whether the target had been reached for two weeks. (See Employer's Exhibit No. 2.) The inquiry bore signatures from both parties.

The letter from the Western Area pointed out precisely the anomaly already described in this report. In other words, a low volume of mail on Tuesday skewed the percentages when divided by a weekly average of total mail volume. The same problem had been raised by another area in a telephone conversation. This and several other issues arose in the weeks following the initiation of DPS. Rather than attempting to resolve each new problem separately, the parties agreed in the summer of 1993 to combine all the outstanding issues and to negotiate an additional Memorandum of Understanding, initially dubbed the "Mother of all MOU's." The parties, however, were unable to deliver the "Mother of all MOU's," and negotiations broke down in February of 1994. Throughout this time period, the inefficiency of the "daily" method continued to be problematic for management.

On March 8, 1994, Ms. Sherry Cagnoli, Contract Administration Manager, sent a letter to the Union stating that the "daily" method previously adopted by management in the "Cookbook" needed attention and "had created anomalies that needed

to be corrected." (See Union's Exhibit No. 6.) Reasoning that such a correction "does not represent a change to any of the parties' MOU's," Ms. Cagnoli advised the Union that management intended to revise its guidelines in order to replace the "daily" method with a "weekly average" method.

The Union immediately objected and asserted that the Employer's proposed methodology violated the parties' agreements. (See Union's Exhibit No. 7.) Two days later, Mr. Sam Green, nevertheless, sent instructions to Postal Service managers calling for the use of a weekly average for determining when a target percentage is reached and made clear that the "weekly average" method was to replace the method of dividing daily DPS volume by the average of weekly inspection data. He unilaterally was changing guidelines set forth in the "Cookbook." (See Union's Exhibit No. 8.)

The Union quickly objected to this unilateral change to the "Cookbook" guidelines as being inconsistent with and a violation of (1) the M-39 and M-41 Handbooks; (2) the Memoranda of Understanding; and (3) the Joint Training Guide. A grievance ensued on March 17, 1994 with nine complaints. All have been resolved but the issue under review in this case.

In cases at this level, rarely is all truth on one side of the transaction. The totality of the record suggested that work units have used and are using both methods of measuring DPS percentages. Mr. Jeff Lewis, Operations Specialist, testified, however, that "By setting targets that were imprudently low," the units using the "12-day" method

tended to be less productive and had higher increases in delivery costs than other units. (See Tr., vol. 3, p. 40.)

B. Meeting Target Percentages Within Five Percent

Target percentages are used in two ways. First, they serve as a tool for planning route adjustments. Second, they dictate the timing for implementing route adjustments. Language of the Memorandum of Understanding suggests that only the first function initially had been considered in detail by the parties. As the parties agreed in September of 1992:

> Should the actual percentage of DPS mail be outside these limits, then management must recalculate the estimated impact on carrier routes, based on the actual percentage of DPS mail being received at the unit. The results of the recent route inspection and evaluation will be used to determine a new impact and construct a new plan or management may wait for the plan levels to be received. (See Union's Exhibit No. 2, pp. 62-63, emphasis added.)

The Memorandum of Understanding in September of 1992 used a singular noun, namely, "percentage" leading to an assumption that only a single number is possible here.

An important implication of missing the target was that management must repeat the complex, time-consuming process of reevaluating impacts and redrawing route maps. But further deliberations by the parties made the practical implications of the target percentages more evident. The Joint Training Guide states that the target figure constitutes an essential

part of the plan. The target figure:

> Will be used for two purposes: (1) to calculate the projected impact on letter carrier office time. . .; and (2) to trigger the Postal Service's right to implement the planned route realignment. (See Union's Exhibit No. 2, pp. 18-19.)

The triggering process is also important. Accordingly, in October of 1992, the Union raised a question about whether meeting it on one day would be sufficient.

The Joint Training Guide states that the five percent variance was adopted to avoid recalculating the estimated DPS impact and restructuring the delivery routes if the target was not precisely met. (See Union's Exhibit No. 2, p. 18.) Such an allowance prevents the parties from being locked too rigidly into what admittedly are rough estimates of future effects. There is no indication in either the Memoranda of Understanding or the Joint Training Guide that the five percent variance (plus or minus) was adopted to allow for day-to-day mail flow differences, as the Union suggested. Only in the Cookbook, written several weeks later by an individual not involved in negotiation for the Memoranda of Understanding, did the five percent variance surface as a factor in determining implementation schedules. This suggests the parties originally assumed that only one number would be used to determine whether the target had been met.

Only after the Memoranda of Understanding had been issued and the parties met in October of 1992 did they realize that relying on numbers for a single day presented problems if the day used was not representative of normal mail flow. Workers

recognized that the results would be detrimental if the day used had heavier than usual mail volume. Although the Union was first in voicing its concern, anomalous results from a single day impact both parties, depending on whether the volume is heavier or lighter than average. Thus, the parties agreed to require "two consecutive weeks" for meeting the target, and this language was incorporated into the Joint Training Guide.

The parties still did not fully appreciate the implications of the change and the variables it introduced into the process. It, after all, was a new undertaking, and the parties were learning along the way. When Mr. Lewis began to compose the methodology for determining when to implement the route restructuring, he had the unenviable task of reconciling the "five percent variance" language (which was predicated on a single number) with the "two consecutive weeks" language (which had the potential of using twelve different numbers). One reasonable solution was to average each week and to compare the weekly average of DPS mail to the weekly average volume from Form 1840. Using this approach, the average for a week would yield a single number. If it was within five percent of the target for two consecutive weeks, management could implement the planned route changes. If it was outside five percent, management could wait or recalculate. The option of waiting seemed to assume that the variance is more than five percent below the target, not above.

At first glance, it might seem that the five percent

variance was adopted for the very purpose of effecting an average for two weeks. But if such were the case, why require that the volume not go more than five percent above the target, as well as below? For whatever reason, Mr. Lewis chose to use the daily formula. As Mr. Tom Peterson, Manager of Delivery Program Support for the Western Area, pointed out, this formula compared the "daily" amount of DPS mail to a "weekly" average and, therefore, produced anomalous and unreliable results. (See Tr., vol. 1, p. 189.)

The anomalies were caused by wide fluctuations in mail volume, typically resulting in a light mail day on Tuesday. Thus, measuring Tuesday's volume against the weekly average ordinarily produced a considerably lower percentage than other days of the week, even though the percentage for that day was within the target range. Under the Cookbook formula, this fluctuation would prevent implementation of planned DPS restructuring at the target percentage, despite an overall average within the target range. The target often would have to be lowered to implement DPS. Evidence submitted to the arbitrator suggested that many units resorted to lowering their targets in order to do so. Comparing a weekly average of DPS to a weekly average of total mail would provide more consistent results, would mirror the method used in the "count and inspection" process outlined in the M-39 Handbook, and would avoid multiple future adjustments.

C. General Goals of the Memoranda

The purpose of the agreements submitted to the arbitrator in this case balanced several competing interests. It, ultimately, is in weighing these same interests that a resolution of the dispute before the arbitrator will be found. When circumstances produce such an unbalanced contractual result that one party's purpose in the transaction is completely frustrated, decision-makers long have considered the contractual import of such circumstances. (See, e.g., Krell v. Henry, 2 K.B. 740 (1903)). Arbitrator Mittenthal, in the Hempstead Award, foresaw the possibility of the problem confronted by the parties. In the Hempstead Award, Arbitrator Mittenthal stated that a narrow adherence to M-39 Handbook principles, in the face of unanticipated circumstances such as automation, could result in a "two step adjustment procedure where one step would suffice," and he observed that, if the parties were not cautious, they could cause themselves "needless disruption and inefficiency." (See Union's Exhibit No.1, p. 18.) In the case before this arbitrator, the unanticipated results of the daily formula threaten the commitment of the parties to efficiency. Likewise, unilateral action by management threatens the cooperative intent of the parties.

A Commitment to Efficiency: The Memorandum of Understanding on Joint Agreements provides that the Memoranda are based on three fundamental principles, namely,

(1) Provide the best service to postal customers;

(2) Minimize the impact on letter carrier craft employees; and

(3) Create an opportunity for increased efficiency.

(See, Union's Exhibit No. 2, p. 59.)

It was the intent of the parties that the Employer's interests in efficiency are not to be achieved at the expense of either workers or postal patrons, but an underlying assumption is that the parties entered into the Memoranda of Understanding for the purpose of facilitating new technologies and realizing their cost savings. In the introduction to the Joint Training Guide, the parties acknowledged that new technologies will cause "changes in working lives of letter carriers," but the parties also state:

> Both parties recognize that the delivery point sequencing of letter mail will change the delivery environment, ultimately producing significant efficiency gains for the Postal Service and better service for postal customers. (See Union's Exhibit No. 2, p. 1, emphasis added.)

Neither the unilateral nor the X-Route methods are the final word in adjusting routes for future changes. Both methods require that parties conduct post-realignment evaluation within 60 days of DPS adjustments. Regardless of the method by which an adjustment was made, a poorly adjusted route can be evaluated and corrected. In keeping with the overall goal of route adjustment found in Section 243 of the M-39 Handbook as well as in the Memoranda of Understanding, the Joint Training Guide provides that the parties will evaluate the adjustment to "insure that routes are as near to 8 hours as possible."

(See Union's Exhibit No. 2, p. 20.)

Any method resulting in routes that do not require further adjustment would seem to fulfill the intent of the parties with regard to efficiency. Indeed, Arbitrator Mittenthal offered as one reason for expanding the environment in which route adjustments may be made the fact that it avoids "forcing management to make several incremental changes in routes," and it also advances "the fair and principal application of the M-39 route adjustment machinery." (See Union's Exhibit No. 1, p. 13.) But the methodology that was chosen in ignorance of actual future circumstances is now defeating the underlying purpose of the parties' agreement, namely, that of efficiency.

Joint Resolution of Problems: Nor can the cooperative environment in which the original six Memoranda of Understanding were negotiated, drafted, and signed be ignored. Pursuant to the charge from Arbitrator Mittenthal in the Hempstead Award as well as inspired leadership in the Postal Service and the Union, both the Employer and the Union, at the time of signing the memoranda, were strongly committed to the principle of cooperation and joint planning for the future. This cooperation extended beyond execution of the Memoranda of Understanding and permeated the Joint Training Guide, the joint training sessions at Crystal City, the joint committee for drafting answers to question, and even the unsuccessful negotiation of the "Mother of All MOU's." The parties embedded

cooperation in this transaction, as evidenced in the introduction to the Joint Training Guide. It states:

> In September, 1992 the U.S. Postal Service and the National Association of Letter Carrier decided to work together to make the change to an automated environment. The parties executed six Memorandums of Understanding which resolved past disputes and set a joint course for the future. (See Union's Exhibit No. 2, p. 1, emphasis added.)

Moreover, the Memorandum of Understanding on Joint Agreement states:

> Our mutual hope is that the following agreement will provide a basis for trust and cooperativeness and that they will form a basis on which to satisfy our customers' needs. While each agreement may not accomplish all that each party may desire, collectively they will form the basis for a positive working relationship of mutual trust and respect, and the foundation for continued empowerment of all employees. (See Union's Exhibit No. 2, p. 59, emphasis added.)

The parties agreed at the time that the Memoranda of Understanding represented a new way of doing business, signified by joint training and joint administration of the Memoranda. The Joint Training Guide states:

> The parties will resolve disputes concerning the Memorandums through a joint process at the national level. A joint body is being created which will have continuing responsibility for seeing that the Memorandums are interpreted and enforced correctly and fairly. Questions regarding proper interpretations will be forwarded to this joint body for resolution. (See Union's Exhibit No. 2, p. 2, emphasis added.)

Such language highlighted a firm commitment by both parties to cooperation and joint resolution of disputes. Using language of a contractual nature, the parties made promises to each other, and now they must keep their word. Whether management violated the spirit and letter of its promise is at the heart

of the dispute in this case.

D. The Effect of Changed Circumstances

People entering into agreements cannot evaluate all possible information that might affect a particular transaction. Starting with the presumption that contracts are to be performed, one school of thought argues that any deviation from an agreement must be treated as a contractual violation, especially if the contract breaker is the superior risk bearer. Within the context of a particular transaction, the party who is the more efficient bearer of a particular risk is viewed as the superior risk bearer and, in changed circumstances, should bear the risk, assuming the parties have not assigned the risk to one of them. The theory is even sounder if one of the parties is in a better position to prevent the risk from materializing.

The case before the arbitrator had its roots in a commitment of the parties to engage in cooperative problem-solving. The solution to the dispute must be found in a cooperative effort at joint resolution. The problem is rooted in both parties' incomplete understanding of the impact of implementing Delivery Point Sequencing. The truth is to be found on both sides of the negotiation table in this case.

The Union is correct that the Memoranda of Understanding and the Joint Training Guide committed the parties to cooperate

with each other. Management's unilateral change to a weekly average, after failing to reach agreement with the Union, was overbearing and decidedly uncooperative, but management to that juncture was a model of cooperation. The Employer shared its draft of the Cookbook with the Union and sought guidance from the Union with regard to the contents of the Cookbook, even though this went beyond the scope of the Memoranda of Understanding. The Employer participated in joint training and joint responses to questions from the field. When management received a question about the "daily" versus the "weekly average" problem in April of 1993, it did not immediately offer its own solution but, instead, included the issue in negotiations held that summer with the Union.

Managers are decision-makers. They act in response to a sea of changing conditions. It was only because the parties' original method produced an unexpected and severe result (and after several months of unsuccessful efforts to resolve the problem jointly) that management unilaterally changed to the "weekly average" method. This is a case where the result is consistent with the intent of the parties, but the means used to achieve the result is not.

Evidence submitted to the arbitrator suggested that the parties agreed on a 12-day formula at least by January of 1993. The fact, however, that none of the written agreements to that date included a specific formula suggests that the method, at some point, purposefully had been left open by the parties or had not been fully understood and considered.

In other words, the parties had left a gap in their agreement.

The Employer was the first to fill the gap with the 12-day formula in the Cookbook. When initially given an opportunity to comment on the formula, the Union deferred to management. But this was not necessarily conclusive of its being a binding agreement. The Employer took a risk in committing the daily formula to writing, and it may well have been able to contemplate that changed circumstances might impair its usefulness. In modern contract law, the effect of such changed circumstances is assigned to the party better able to foresee or control them. (See, e.g., Transatlantic Finance Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966); and United States v. Wegematic Corp., 360 F.2d 674 (2nd Cir. 1966)). With the data at its control, of course, the Employer was more able to foresee or to control the propriety of a particular formula. In other words, even though circumstances changed after the parties entered into their bargain, they failed to relieve the Employer of its contractual obligation. Changed circumstances did not make performance as agreed impracticable even though it increased the degree of inefficiency.

At the core of this dispute is a practice which resulted from changed circumstances, but not sufficiently changed to excuse the Employer. The 12-day formula measures daily DPS volume against a weekly average. It encourages the various inefficiencies that Arbitrator Mittenthal referred to in his Hempstead Award. The formula, in effect, would return the Postal Service to a situation in which route adjustments cannot be accurately predicted, akin to circumstances

experienced before the parties negotiated their Memoranda of Understanding. This is a serious result clearly outside the contractual intent of the parties.

On the other hand, the "weekly average" formula seems to work better. The revised methodology suggested in the "Sam Green" memorandum results in percentages that are more consistent, accurate, and meaningful. The target percentage, then, can be used, pursuant to the Joint Training Guide methodology, accurately to predict how many minutes of letter carrier time will be saved. Such information is of importance to both parties as well as to postal patrons.

An over-arching goal of the Memoranda of Understanding was that carrier routes should be adjusted as nearly as possible to eight hours. Achieving this goal is necessarily a fluid process, subject to adjustment with experience, as evidenced by the required 60-day evaluation after DPS implementation. Following the Mittenthal Award, the jointly held intent of the parties was to minimize necessary adjustments and disruptions to carrier routes. Using an inaccurate method of measuring DPS percentages frustrates this contractual intent.

It is clear that averaging the weekly data is better suited to needs of the parties than using the daily method to achieve efficiency goals because averaging the weekly data is more accurate and requires fewer subsequent adjustments. It, however, is equally clear that the Employer's unilateral action in this case is decidedly at odds with the parties'

commitment to resolve such issues jointly. Moreover, evidence suggested there may be other methods of measuring DPS percentages that achieve equally accurate results. The parties need to revisit the issue in accordance with their contractual commitment to cooperate with each other, but it is important that neither party use this as an opportunity to insist on further concessions. While the Employer will be permitted to use its revised methodology of averaging weekly data in the interim, the parties must honor their commitment to cooperate and renegotiate a method acceptable to both that meets the overall purpose of the M-39 Handbook and the Memoranda of Understanding. Such a solution should minimize route adjustments and allow the needs of both parties to be balanced.

The effect of the 12-day formula frustrated the purpose of the parties in making their agreement. As Section 265 of Restatement (Second) teaches:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary. (See p. 335 (1981)).

In other words, the Employer is excused from applying the 12-day formula; but there is an obligation to renegotiate a mutually acceptable method of measurement. In the interim, the Employer will be permitted to continue using the weekly average formula.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer's unilateral change to the methodology for determining when the target percentage is reached violated the parties' commitment to joint administration of the DPS process. The dispute is remanded to the parties for further negotiation and joint resolution in light of this opinion. Until such a resolution is achieved, the Employer may continue using the "weekly average" method. In the event that negotiations are unsuccessful, the arbitrator shall retain jurisdiction until December 1, 1997; and either party may cause the matter to be scheduled for remedial hearings in arbitration by giving notice to the arbitrator no later than December 1, 1997. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: August 4, 1997